Supreme Court, U.S.
FILED

(1)

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No.

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

JOHN SMILEY,
Petitioner,

v.

COMMONWEALTH OF KENTUCKY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH OF KENTUCKY COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

JAMES A. MAPLES
COUNSEL OF RECORD

JAMES A. MAPLES
MAPLES, HOLBERT, GREGORY,
PEARL & DUNAWAY
#58 PUBLIC SQUARE
ELIZABETHTOWN, KY 42701
(502) 769-1606
(502) 765-6765 FAX
COUNSEL FOR PETITIONER

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO 800-890-5001

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QUESTION PRESENTED

1. Because there is absolutely no evidence regarding the operation of the Petitioner's vehicle to offer at trial and since no corroborating evidence occurred regarding operation of the motor vehicle it was a violation of Petitioner's Fifth and Fourteenth Amendment rights to due process and his Sixth Amendment right to a fair trial under the United States Constitution, and a conviction would violate his constitutional rights.

LIST OF PARTIES

The Petitioner is John Smiley, an individual. The Commonwealth of Kentucky is the Respondent.

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OPINIONS BELOW

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JURISDICTION

The Final Order entered by the Commonwealth of Kentucky Court of Appeals was entered on June 5, 1997 (App. C at A7). The jurisdiction of this Court is invoked under 28 U.S.C. Subsection 1254. The Order affirming the District Court Order of Conviction (App. B at A4) was entered on April 9, 1997. The Agreed Order of Conditional Plea and Stipulation of Facts (App. A at A1) was entered on October 25, 1996.

STATEMENT OF THE CASE

In the action herein the prosecution sought a prosecution for the offense of Driving Under the Influence of Alcohol in the Hardin District Court in Hardin County, Kentucky. All parties agreed to what the facts were in the Agreed Order of Conditional Plea and Stipulation of Facts (App. A at A1). Basically, the Petitioner had pulled off the Western Kentucky Parkway in Kentucky to rest and take a nap. He put on his flashers to warn anyone who might otherwise get over into the emergency lane. His engine was running and there was no other occupant in the vehicle. The officer involved did not at anytime observe the vehicle moving. No other evidence is available on behalf of either party except the arresting officer and the Petitioner. The parties stipulated that the blood alcohol concentration was

.14. The Commonwealth was ready to put this evidence on at trial, if necessary.

The Petitioner herein has argued throughout this case beginning in District Court that it is a violation of his Fifth and Fourteenth Amendment right to due process under the United States Constitution and his Sixth Amendment right to a fair trial to convict him under the facts and circumstances of this case. Kentucky law clearly requires the evidence of operation of a vehicle before one can be convicted. This appeal was brought to the Supreme Court of the United States from the Kentucky Court of Appeals. The Kentucky Court of Appeals is the highest level that one can appeal to if one starts in the misdemeanor court, i.e. District Court in the State of Kentucky. The remedies are District Court, right of one appeal in Circuit Court, and Motion for Discretionary Review in The Kentucky Court of Appeals. The remedies were all exhausted and, as such, this appeal has been brought to The United States Supreme Court.

ARGUMENTS

ARGUMENT NO. I

BECAUSE THERE IS ABSOLUTELY NO EVIDENCE REGARDING THE OPERATION OF THE MOTOR VEHICLE BY THE PETITIONER HEREIN, AND AS THE COURT OVERRULED A MOTION BY PETITIONER TO DISMISS THE ACTION HEREIN FOR LACK OF EVIDENCE IN VIOLATION OF THE PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT DUE PROCESS RIGHTS AND HIS SIXTH AMENDMENT RIGHT TO A FAIR TRIAL

UNDER THE UNITED STATES CONSTITUTION, THE PETITION SHOULD BE GRANTED.

Throughout the United States a number of factors have been considered in determining what evidence is necessary to decide whether a person operated or was in actual physical control of a motor vehicle in Driving Under the Influence cases. The primary factors considered appear to be the following:

(1) whether or not the person in the vehicle was asleep or awake.
(2) whether or not the motor was running
(3) the location of the vehicle at the time of the arrest; and
(4) the intent of the person behind the wheel at the time of the stop or arrest. See Annot., 93 A.L.R. 3d, 7 (1979)

In the action herein Petitioner was found in the emergency lane of the Western Kentucky Parkway. He was asleep behind the wheel but the engine was running. No other occupant was in the vehicle. The officer did not observe the Petitioner's vehicle moving. And, the emergency flashers on the vehicle were flashing which could clearly indicate that the Petitioner did not intend to begin driving his vehicle. As such, there was absolutely no evidence of operation of the vehicle that exists in the action herein.

Only two cases appear to exist in Kentucky law where a conviction was allowed under any circumstances anywhere like those at bar. In *DeHart v. Gray,* Ky., 245 S.W.2d 434 (1952), Kentucky's Highest Court allowed a conviction. However, the vehicle involved had been left in the middle of the road running and the owner and operator of the vehicle

returned to the vehicle and informed the police that he was about to drive the vehicle again. This obviously does not fit the facts of the case at bar.

The other case decided by Kentucky Courts is the basis of *Newman v. Stinson,* Ky., 489 S.W.2d 826 (1972). In *Newman, supra,* Kentucky's Highest Court held or sustained a conviction. However, the vehicle involved was parked at an intersection with a driver behind the wheel, with the engine was running, in the middle of the road at a red light. The red light had changed from red to green on numerous occasions and the vehicle had not moved. The facts also do not come anywhere close to the facts in the action herein.

The cases on point similar to the facts of the cases on point similar to the facts of the case at bar are *Pence v. Commonwealth,* 825 S.W.2d 282 (Ky., App. 1991) and *Wells v. Commonwealth,* 709 S.W.2d 847 (Ky. App. 1991). In *Pence, supra,* the Movant was found in Hardin County off the road as in the case at bar. However, in *Pence, supra,* the Movant was found sitting behind the wheel. In this case the Movant also admitted to the officer that he had been operating the vehicle. In spite of the facts, the Circuit Court of Kentucky, and the Kentucky Court of Appeals affirmed the Order by the District Court that this was in violation of both Kentucky cases and the constitutional rights of the Petitioner under the United States Constitution.

ARGUMENT NO. II

BECAUSE NO EVIDENCE WAS OFFERED AT THE TRIAL COURT TO SHOW THAT THE PETITIONER HEREIN WAS EITHER OPERATING THE VEHICLE OR IN PHYSICAL CONTROL OF THE VEHICLE AND SINCE THE PETITIONER HEREIN

DID NOT EVEN TESTIFY AT TRIAL AND NEVER GAVE A STATEMENT THAT HE WAS OPERATING THE VEHICLE AT THE TIME THAT HE WAS STOPPED AND AS THERE IS ABSOLUTELY NO CORROBORATING EVIDENCE TO OPERATION OF THE VEHICLE HEREIN, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

As stated above, no evidence exists in the case at bar regarding operation of the vehicle. Even if there had been a statement in the case at bar made by the Petitioner out of Court there still would not be enough evidence to sustain a conviction because there is absolutely no corroborative evidence of operation of the vehicle. As such, pursuant to *Wilson v. Commonwealth,* Ky., 476 S.W.2d 622 (1971) a conviction in the action was clearly erroneous.

CONCLUSION

For the reasons stated herein, a Petition for Writ of Certiorari should be granted. To deny this right would be an extreme violation of Petitioner's rights under both Kentucky law and Federal law.

Respectfully submitted,

/s/_____
JAMES A. MAPLES
COUNSEL OF RECORD

JAMES A. MAPLES
MAPLES, HOLBERT, GREGORY
PEARL & DUNAWAY
#58 PUBLIC SQUARE
ELIZABETHTOWN, KY 42701
(502) 769-1606
(502) 765-6764 FAX

COUNSEL FOR PETITIONER

APPENDIX A

HARDIN DISTRICT COURT
ELIZABETHTOWN DIVISION
CASE NO. 96-M-01029

COMMONWEALTH OF KENTUCKY PLAINTIFF

AGREED ORDER OF CONDITIONAL PLEA AND STIPULATION OF FACTS

VS.

JOHN SMILEY DEFENDANT

* * * * * * * *

The parties hereto agree that the Defendant be allowed to enter a conditional plea pursuant to RCr 8.09. Further, both parties agree to the following stipulation of facts in the case at bar:

1. Found in the emergency of Western Kentucky Parkway on the west bound side of highway at approximately 132.5 mile marker.

2. The Defendant was in the automobile behind the steering wheel.

3. The engine was running also.

4. No other occupant was in the vehicle.

5. The emergency flashers on the vehicle were flashing while the Defendant was stopped.

6. At no time did the officer observe the Defendant's vehicle moving.

7. No other evidence is available on behalf of either party except the arresting officer and the Defendant.

The parties stipulate that the blood alcohol concentration was .14. The Commonwealth has the lab technician and all evidence ready and available at trial should the case have been tried.

The parties agree that should the final result of the appeal be an affirmation of the conditional guilty plea that the Defendant shall pay a fine of FIVE HUNDRED DOLLARS ($500.00), and shall receive a twelve (12) month sentence for which the Defendant will serve 120 days in the Hardin County Jail and have the remainder of said sentence probated.

This Clerk shall provide both parties a copy of this order immediately upon execution by the Court.

This the 25th day of October, 1996.

/s/_____
T. STEVEN BLAND
JUDGE, HARDIN DISTRICT COURT

Have seen and agreed to:

R. KEITH BOND	JAMES A. MAPLES
ASST. COUNTY ATTY.	COUNSEL FOR DEFENDANT

APPENDIX B

HARDIN CIRCUIT COURT

CASE NO. 96-XX-0024 DIVISION II

JOHN SMILEY APPELLANT

VS.

COMMONWEALTH OF KENTUCKY APPELLEE

APPEAL FROM HARDIN DISTRICT COURT
HON. T. STEVEN BLAND, JUDGE
NO. 96-M-01029

* * * * *

AFFIRMED

This is an appeal from a judgment of the Hardin District Court adjudging Appellant guilty of Operating a Motor Vehicle While Under the Influence of Alcohol, KRS 189A.010, pursuant to a conditional plea by Appellant dated October 25, 1996, RCr 8.09.

On appeal, Appellant argues that the trial court committed error during the procedures against him which virtually denied him a fair trial thus denying him a right to due process. The Appellant raises two issues as his basis for this appeal, (1) there was no evidence presented at trial

regarding the operation of the motor vehicle by Appellant and (2) no evidence was offered at trial to show that the Appellant was either operating the vehicle or in physical control of the vehicle. Appellant therefore, request that this Court reverse the decision of the Hardin District Court and dismiss the action against the Appellant with prejudice because jeopardy has attached.

A review of the record indicates that the Appellant was found stopped in the emergency lane of Western Kentucky Parkway with his emergency flashers on, sitting behind the steering wheel with the engine running. The officer observed no other occupants in the vehicle. The officer's report stated that when the Appellant was confronted the officer smelled a strong odor of alcohol on the breath of the Appellant and the Appellant was unstable on his feet. The Appellant also admitted to drinking two beers. When administered a field sobriety test the Appellant failed the test. The Appellant was then placed under arrest for violation of KRS 189A.010.

Appellant attempts to apprise the Court of the factors to be considered in determining whether or not a person operated or was in actual physical control of a motor vehicle, for purposes of determining whether they were operating a motor vehicle while under the influence of alcohol as articulated in Wells v. Commonwealth, Ky. App., 709 S.W.2d 847 (1986), as well as Harris v. Commonwealth, Ky.App., 709 S.W.2d 846 (1986). However due to a slight oversight by Appellant, he misinterprets the third factor, which should read "(3) location of vehicle and all of circumstances bearing on how vehicle arrived at that location", not simply "the location of the vehicle at the time of the arrest", as stated by the Appellant.

Utilizing the criteria outlined supra, the Court, can only conclude that the location of the vehicle in a rural area on the Parkway, parked with the engine running, the only occupant being the Appellant and there being no vehicle

emergency, the vehicle was in fact driven there by Appellant. The charge of violation of KRS 189A.010 Driving While Under the Influence of Alcohol by Appellant is substantiated by the facts as stated in the record.

WHEREFORE, the judgment of the Hardin District Court is AFFIRMED.

This 9th day of April, 1997.

/s/_____
HUGH ROARK
JUDGE, HARDIN CIRCUIT COURT
DIVISION II

APPENDIX C

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

NO. 97-CA-1003-D

JOHN SMILEY MOVANT

ON MOTION FOR DISCRETIONARY REVIEW
FROM HARDIN CIRCUIT COURT
ACTION NO. 96-XX-24

V.

COMMONWEALTH OF KENTUCKY RESPONDENT

*** *** ***

ORDER

BEFORE: HUDDLESTON, JOHNSON, and KNOPF, Judges.

Having considered movant's motion for discretionary review, and being otherwise sufficiently advised, this Court ORDERS that this motion be, and it is hereby, DENIED.

ENTERED: June 5, 1997 /s/_____
WILL KNOPF
JUDGE, COURT OF APPEALS